BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRUCE ALLEN WYNNE Claimant	)	
VS.	)	
CONTINENTAL SUPPLY CHAIN SRVS. Respondent	)	Docket No. **1,035,161**
AND	)	
ZURICH AMERICAN INSURANCE CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requested review of the May 27, 2011 Award by Administrative Law Judge Thomas Klein. The Board heard oral argument on September 16, 2011. The Workers Compensation's Director appointed E.L. Lee Kinch of Wichita, Kansas, to serve as Board Member Pro Tem in place of former Board Member Julie A.N. Sample.

APPEARANCES

Randy S. Stalcup of Andover, Kansas, appeared for the claimant. Dallas Rakestraw of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The claimant alleged he suffered a repetitive series of injuries to his back and left hip from constant standing, walking and lifting while performing his job duties commencing

February 2006 and each workday thereafter.[1] The respondent denied claimant suffered accidental injury arising out of and in the course of his employment and argued claimant's preexisting medical conditions are the cause of his back and hip complaints. Respondent further denied timely notice of injury.

The Administrative Law Judge (ALJ) found claimant provided timely notice and met his burden of proof to establish accidental injury arising out of and in the course of his employment as his job duties aggravated and intensified his preexisting conditions. Consequently, the ALJ awarded compensation for a 78.5 percent work disability based upon a 57 percent task loss and a 100 percent wage loss.

Respondent requests review of whether claimant's accidental injury arose out of and in the course of employment and whether he provided timely notice.

Claimant argues he is permanently and totally disabled but otherwise requests the Board to affirm the ALJ's Award.

The issues for Board determination are: (1) Whether claimant provided timely notice; (2) Whether claimant suffered accidental injury arising out of and in the course of employment; and, (3) Nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Bruce Wynne was hired full-time as a supply tech in February 2006 for Continental Supply. He had been performing the same job as a temporary employee for approximately six months before becoming a full-time employee for respondent. Claimant's job was to pull medical supply boxes off of the warehouse shelves, put them on a flat bed cart, sort into bins that are on a push cart and then deliver the supplies to certain hospital rooms.

The boxes of supplies that were being moved by claimant from the warehouse weighed approximately 30-100 pounds. The bins weighed 30-50 pounds and there were 9-12 bins on the push cart which claimant would use to deliver the bins to the rooms. Claimant would repeat this process four or five times a day. His job required standing, walking, lifting, loading and unloading bins. Claimant testified that he would lift an average

[1] Claimant initially alleged constant standing and walking at work caused his injuries but later filed an amended application to include lifting.

of 50-100 boxes per hour. It would take claimant an hour and a half to deliver the supplies and he also spent about 45 minutes inputting data into a computer in an 8-hour day.

Claimant first began having problems with his low back in 2006. Lifting boxes at work and pushing the cart at work caused back pain and stiffness. Claimant also started having right hip pain in 2006. On cross-examination, claimant testified:

> Q. Was there any one specific event that occurred to you while employed at Supply Chain where you had a sudden onset of pain in your low back?
>
> A. As I was lifting, I always had some pains, yes.[2]

But initially, claimant thought his back and hip problems were related to the problems he had with his feet. Claimant is a type II diabetic and takes medication for that condition. Claimant also had difficulties with corns and callouses on his feet as well as bilateral bunions and hammertoe.

As his back and hip pain continued, claimant sought treatment from his physician, Robert S. Kenagy. An MRI of the lumbar spine on August 24, 2006, revealed multiple levels of foraminal encroachment caused by disc protrusions, most prominently at the L4-5 level. But claimant's feet were also causing him significant difficulties and he sought treatment with Dr. Frank Galbraith, a podiatrist. Ultimately on March 20, 2007, Dr. Galbraith performed surgery on claimant which consisted of a bunionectomy with osteotomy of the first metatarsal and phalanx bilaterally as well as repair of hammertoes, second toes bilaterally, with arthroplasty procedure and K-wire fixation. Claimant was off work for approximately four months. When claimant was released to work he was limited to four-hour workdays but still performed the same job duties.

After claimant returned to working four hours a day, he began to experience numbness and tingling in his bilateral upper extremities. In September 2007, claimant was diagnosed with osteoarthritis at C4-5, C5-6. He was also diagnosed with carpal tunnel syndrome as well as ulnar nerve entrapment. He declined surgery.

Claimant's back and hip pain continued and Dr. Kenagy referred claimant to Dr. Charles Pence. Dr. Pence diagnosed claimant with osteoarthritis to the right hip with degenerative spondylosis to the spine as well as status post hammertoe repair. Dr. Pence recommended bilateral hip surgery but the claimant declined.

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[2] R.H. Trans. at 52.

Eventually claimant concluded the lifting at work caused his back and hip problems. It was claimant's uncontradicted testimony that he told his supervisor, Teresa Casey, about his back and hip pain after his hammer toe surgery in 2007. Claimant testified:

> Q. All right. Now, did you have conversations with these two females that you are talking about in terms of the way you felt during this period of your 20-hour work weeks, which lasted about a year?
>
> A. Yes.
>
> Q. All right. But as I understand it, you never directly told either one of them that you thought the problem with your back or hips was related to work activity, is that correct, you didn't tell them that?
>
> A. After I found out, I told them, you know, it was probably from lifting and everything.
>
> Q. That's what I'm trying to get at.
>
> A. Yeah.
>
> Q. After you found out -- well, what do you mean, after you found out what?
>
> A. Well, every time I talked to them, I would let them know I was stiff, but I really didn't -- when I found out it was my back, I learned it was my back and hip that was the problem after my MRI and everything, and I let them -- you know, then when I was -- I found that out when I was on my short-term disability.
>
> Q. You found that out during the 20-hour work weeks?
>
> A. Yes, yes.
>
> Q. And is that when you told one of them you thought the back or hip problems was being aggravated or having a problem because of work activity?
>
> A. Yes, from the lifting.
>
> Q. You specifically told who that, who did you tell?
>
> A. Teresa.[3]

[3] R.H. Trans. at 46-47.

Claimant returned to full-time work in February 2008 and continued through January 12, 2010. Claimant was placed on family medical leave from January 12, 2010, for three months. Respondent then placed claimant on regular medical leave for another three months. Claimant was advised in July 2010 that his position was being abolished and his employment was terminated.

Claimant testified that his symptoms with his back and hip did not change when he was only working 4 hours a day. He said his back symptoms stayed the same even though he was off for four months due to surgery on his feet. He was off work for six months in 2010 and again his back didn't get any better. Claimant further testified that his pain and discomfort in his back has basically stayed the same and that he notices increased back pain when he sits too long, lifts boxes, or pushes a cart. Claimant testified that his right side from his hip to his back is more painful than the left side. Claimant applied for Social Security disability and was determined to be eligible for payments beginning in August 2010.

Dr. Daniel Zimmerman, board certified as an independent medical examiner, evaluated claimant due to pain in his hands, feet, back and right hip on August 13, 2008, at his attorney's request. The doctor reviewed the medical records and diagnostic reports provided. Dr. Zimmerman concluded claimant's bilateral hand and feet problems were not causally related to his work for respondent. Upon physical examination, Dr. Zimmerman found claimant had intra spinous tenderness from L1-S1 in his spine, and trochanteric bursal tenderness in palpation on the right side. X-rays were taken of the lumbosacral spine which demonstrated osteoarthritis change at L3-4 and L4-5. The lateral view demonstrated disc space narrowing at L5-S1. The AP view as well as the lateral view of the right hip demonstrated findings consistent with vascular necrosis and osteoarthritic changes. The doctor opined claimant had permanent aggravation of osteoarthritis and vascular necrosis affecting the right hip as a consequence of his work-related duties. Dr. Zimmerman placed permanent restrictions on claimant of no lifting greater than 20 pounds on an occasional basis and 10 pounds frequently as well as to avoid frequent bending, stooping, squatting, crawling, kneeling and twisting activities.

Based on the AMA *Guides*[4], Dr. Zimmerman rated claimant's lumbar spine at 5 percent due to lumbar disc disease and paraspinous myofaciitis. He also gave claimant a 15 percent impairment rating to the right hip due to loss of range of motion which converts to a 6 percent whole person impairment. Using the Combined Value Charts, the 6 percent whole person and 5 percent whole person combine for an 11 percent whole person impairment. Dr. Zimmerman reviewed the list of claimant's former work tasks

[4] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

prepared by Mr. Jerry Hardin and concluded claimant could no longer perform 21 of the 37 tasks for a 57 percent task loss. Dr. Zimmerman testified claimant was capable of substantial gainful employment as limited by his restrictions.

On cross-examination, Dr. Zimmerman testified claimant's low back pain started after his foot surgery due to an altered gait. Claimant also began having problems with his hip due to the altered gait as well. Dr. Zimmerman opined that after March 20, 2007, when Dr. Galbraith placed restrictions on claimant of working only 4 hours a day, the claimant walked awkwardly with an antalgic gait which aggravated the back and right hip. And Dr. Zimmerman attributed the antalgic gait to the foot surgery. On cross-examination, Dr. Zimmerman explained:

> Q. So, in effect, if I understand correctly, the symptomology, the permanent aggravation, and the structural change in the low back would have been a natural and probable consequence of the foot condition and the surgeries, correct?
>
> A. Yes.
>
> Q. Okay. And likewise, the symptomology, the permanent aggravation, structural changes in the -- in the right hip, would have been a natural and probable consequence of the surgeries and the foot condition?
>
> A. Yeah, but also he is working, you know, and aggravating this because of the work duties he is doing.[5]

Dr. Zimmerman testified that claimant's walking and lifting at work will exacerbate and accelerate the pathology in the right vascular-necrosis-affected hip and also his back. Dr. Zimmerman explained:

> Q. Given that aspect, both lifting and that walking, does that play into your opinion that you expressed on direct-examination, that both lifting and the walking had an aggravation, acceleration, or intensification effect upon the anatomical condition of the back and right hip?
>
> A. Yes.
>
> Q. And would you please state that opinion again.
>
> A. Well, it does. I mean, the walking and the lifting structurally worsens the pathology in the avascular-necrosis-affected hip. And since we know he had a back

[5] Zimmerman Depo. at 29-30.

> problem, it also - - he had pathology at the lumbar level predating this, it will exacerbate and accelerate that condition as well.
>
> Q. So the clinical condition exhibited in the lumbar spine would be a natural and direct result of the lifting and walking at work?
>
> A. Yes.
>
> Q. And the condition exhibited in the right hip would be a natural condition of the walking and lifting activities at work?
>
> A. Well, it would have been aggravated by those work activities. The condition is not due to work per se; it's aggravated.
>
> Q. Right. And the aggravation of that does involve physical or anatomical change in the structure of the right hip; is that correct?
>
> A. Yes, absolutely.[6]

Dr. John Estivo, a board certified orthopedic surgeon, examined and evaluated claimant on January 21, 2011, at respondent's attorney's request. The doctor reviewed an extensive amount of medical records which revealed complaints of lumbar spine and hip pain as well as a history of being a diabetic and feet problems. Dr. Estivo testified that claimant was suffering from peripheral neuropathy in his feet due to his diabetes. Claimant had also been diagnosed with osteoarthritis in both hips and Dr. Pence had recommended that he have hip replacements. Upon physical examination, Dr. Estivo found that claimant walked with an altered gait and had hip pain due to his osteoarthritis. The doctor opined claimant's pain could be reproduced by moving his hips rather than examining his lumbar spine. Claimant's altered gait was due to his chronic foot pain and his degenerative joint disease of his hips.

Dr. Estivo testified that claimant's lumbar and hip pain is not causally related to his work accident. The doctor opined claimant had not suffered any work-related permanent functional impairment based on the AMA *Guides*. Dr. Estivo further opined that claimant would not need any additional medical treatment due to his work-related injury. But Dr. Estivo agreed that walking could possibly aggravate claimant's hip condition. Dr. Estivo testified:

> Q. Okay. And does the amount of walking aggravate a preexisting condition, such as -- any of the preexisting conditions as exhibited by Mr. Wynne relative to either of the hips?

[6] Zimmerman Depo. at 37-38.

A. Walking could certainly aggravate his hips.[7]

Dr. Estivo ordered x-rays of claimant's hips. The AP and lateral views of the hips revealed degenerative joint disease in both hips. X-rays of the lumbar spine revealed age-related degenerative changes. The doctor opined:

> I think it is more than likely that his chronic foot pain has led to an aggravation to both of his hips. It has not resulted in any injury to his lumbar spine or any aggravation to his lumbar spine.[8]

Dr. Estivo did not recommend any additional medical treatment of claimant's lumbar spine in relation to his work-related injury on February 1, 2006. The doctor testified that claimant did not require any restrictions regarding his lumbar spine.

Jerry D. Hardin, a personnel consultant, conducted a personal interview with claimant on July 14, 2008, at the request of claimant's attorney. A second interview was completed on September 8, 2010, at which time claimant was receiving Social Security disability benefits. Mr. Hardin prepared a task list of 37 nonduplicative tasks claimant performed in the 15-year period before his injury. Mr. Hardin opined claimant was realistically unemployable because of the marketplace in Wichita, Kansas. But based upon Dr. Zimmerman's restrictions for claimant's back and hip, then he would be able to earn minimum wage in the open labor market.

Initially, respondent argues that claimant failed to provide timely notice. The claimant alleged he suffered a repetitive series of injuries to his back and left hip from constant standing, walking and lifting while performing his job duties commencing February 2006 and each workday thereafter. K.S.A. 44-508(d) provides for the determination of the date of accident in a repetitive trauma case:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met,

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[7] Estivo Depo. at 25.

[8] Estivo Depo., Ex. 2 at 8.

> then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[9]

In this case the date of injury would be the date claimant gave written notice to respondent by filing the E-1 Application for Hearing. The E-1 was filed with the Division on June 19, 2007, and respondent's counsel filed an Entry of Appearance with the Division on June 22, 2007. Accordingly, the respondent had received a copy of the written claim June 22, 2007, and that is the date of accident. Respondent also received written notice of claimant's injuries that same date, consequently, notice to respondent was timely.[10]

Respondent next argues that claimant failed to meet his burden of proof to establish accidental injury arising out of and in the course of his employment. Respondent argues that claimant's preexisting personal conditions were the cause of his current complaints.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[11] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[12]

Dr. Zimmerman concluded that claimant's walking and lifting activities at work aggravated his preexisting problems in his lumbar spine and right hip. And Dr. Estivo agreed that claimant's walking could aggravate his hips. The record established that claimant spent the majority of his workday on his feet walking and lifting. Claimant testified that those activities caused back and hip pain. Based upon a review of the entire evidentiary record the Board finds Dr. Zimmerman's opinion more persuasive and affirms the ALJ's finding claimant suffered work-related repetitive injuries to his back and right hip.

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[9] K.S.A. 2008 Supp. 44-508(d).

[10] *Saylor v. Westar Energy, Inc.*, ___Kan. ___, 256 P.3d 828 (2011).

[11] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[12] *Hanson v. Logan U.S.D. 326*, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

The Board is mindful that respondent also contended that walking, whether at work or not would aggravate claimant's condition. But in this instance the walking at work was done constantly and clearly a work-related activity.[13]

Finally, the parties disputed the nature and extent of disability. Although claimant alleged he was permanently and totally disabled, both Dr. Zimmerman and the vocational expert agreed that claimant could perform substantial gainful employment based upon the restrictions imposed by Dr. Zimmerman. The claimant has not met his burden of proof to establish that he is permanently and totally disabled.

In *Bergstrom*,[14] the Kansas Supreme Court interpreted K.S.A. 44-510e, which governs the computation of claimant's permanent partial general disability, and ruled that it is not proper to impute a post-injury wage when computing the wage loss in the permanent partial general disability formula. The Kansas Supreme Court stated, in pertinent part:

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.[15]
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> K.S.A. 44-510e(a) contains no requirement that an injured worker make a good-faith effort to seek postinjury employment to mitigate the employer's liability. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997), and all subsequent cases that have imposed a good-faith effort requirement on injured workers are disapproved.[16]
>
> We can find nothing in the language of K.S.A. 44-510e(a) that requires an injured worker to make a good-faith effort to seek out and accept alternate employment. The legislature expressly directed a physician to look to the tasks that the employee performed during the 15-year period preceding the accident and reach an opinion of the percentage that can still be performed. That percentage is averaged together with the difference between the wages the worker was earning at the time of the injury and the wages the worker was earning after the injury. The

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[13] See Bryant v. Midwest Staff Solutions, Inc., 292 Kan. 585, 257 P.3d 255 (2011).

[14] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[15] *Id.*, Syl. ¶ 1.

[16] *Id.*, Syl. ¶ 3.

> legislature then placed a limitation on permanent partial general disability compensation when the employee "*is engaging* in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury." (Emphasis added.) K.S.A. 44-510e(a). The legislature did not state that the employee is required to *attempt to work* or that the employee *is capable of engaging in work* for wages equal to 90% or more of the preinjury average gross weekly wage.[17]

Consequently, claimant's actual post-injury earnings must be used in computing his permanent partial general disability. And the difference in claimant's pre- and post-injury wages is 100 percent. And that is claimant's wage loss for the permanent partial general disability formula. The only task loss opinion was provided by Dr. Zimmerman who opined claimant had suffered a 57 percent task loss. Consequently, claimant has met his burden of proof to establish a 78.5 percent work disability.

It should be noted that the ALJ determined the claimant's date of accident was his last day worked but as previously noted, the Board finds that pursuant to K.S.A. 44-508(d) claimant's date of accident is June 22, 2007. Consequently, the award will be recalculated based upon that date of accident.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[18] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Thomas Klein dated May 27, 2011, is modified as to the date of accident and affirmed in all other respects.

Claimant is entitled to 45.65 weeks of permanent partial disability compensation at the rate of $364.23 per week or $16,627.10 for an 11 percent functional disability followed by permanent partial disability compensation at the rate of $364.23 per week not to exceed $100,000 for a 78.50 percent work disability.

As of October 28, 2011, there would be due and owing to the claimant 139.08 weeks of permanent partial disability compensation at the rate of $364.23 per week in the

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[17] *Id.* at 609-610.

[18] K.S.A. 2010 Supp. 44-555c(k).

sum of $50,657.11, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $49,342.89 shall be paid at the rate of $364.23 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this 28th day of October, 2011.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Dallas L. Rakestraw, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge